

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICKY RANDALL OTIS, II,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Civil No. 08cv1181-W (BLM)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than September 9, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

In addition, review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). "Typically, that person is the warden of the facility in which the petitioner is incarcerated." Id. Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. See id.

1 The warden is the typical respondent. However, “the rules following section 2254 do not
 2 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
 3 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
 4 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
 5 petitioner is in custody due to the state action he is challenging, [t]he named respondent shall
 6 be the state officer who has official custody of the petitioner (for example, the warden of the
 7 prison).” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).


8 Here, Petitioner has incorrectly named “People of the State of California” as Respondent.
 9 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas
 10 corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual
 11 person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v. Washington,
 12 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts
 13 upon the custodian of the state prisoner, the person who will produce “the body” if directed to
 14 do so by the Court. “Both the warden of a California prison and the Director of Corrections for
 15 California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d at 895. In order
 16 for this Court to entertain the Petition filed in this action, Petitioner must name the warden in
 17 charge of the state correctional facility in which Petitioner is presently confined or the Director
 18 of the California Department of Corrections and Rehabilitation. Brittingham v. United States,
 19 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

20 This action is **DISMISSED** without prejudice for failure to satisfy the filing fee
 21 requirement and failing to name a proper respondent. If Petitioner wishes to proceed with this
 22 action he must, **no later than September 9, 2008**, satisfy the filing fee requirement **and** file a
 23 First Amended Petition which names a proper respondent. The Clerk of Court shall send a blank
 24 Southern District of California In Forma Pauperis Application and a blank Southern District of
 25 California amended petition form to Petitioner along with a copy of this Order.

26 **IT IS SO ORDERED.**

27 DATED: _____

7/8/08

28 
 Thomas J. Whelan
 United States District Judge